Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

CITY OF OPA LOCKA,

Petitioner,

vs.

A. GRIFFIN,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals issued an opinion in conflict with other decisions of the Supreme Court and Courts of Appeals, when it ruled that City Manager Neal acted under "color of law" when he raped Respondent, Griffin, on the evening of November 1, 1995 in her North Miami apartment.

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Pursuant to Rule 12.5, the materials included in the Appendix to the opening Petition for Writ of Certiorari have not been reproduced again. No additional materials are deemed necessary.

OPINION BELOW

The decision of the Eleventh Circuit Court of Appeals is reported at 261 F.3d 1295 (11th Cir. 2001) and is attached to the opening Petition at App. 1a.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on August 17, 2001. Respondent, Griffin's, request for panel rehearing was denied on October 15, 2001. Pet. App. 45a. The Petitioner, City of Opa Locka, expressly relies on Rule 12.5 in connection with the filing of this Conditional Cross Petition for Writ of Certiorari. The opening Petition for Writ of Certiorari was docketed on January 23, 2002, Case Number 01-1069. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

42 United States Code, Section 1983, states in pertinent part:

> Every person who, **under color of any statute, ordinance, regulation, custom or usage, of any state** . . . subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit and

equity, or other proper proceeding for redress. (Emphasis added).

STATEMENT OF THE CASE

This is an employment related lawsuit. Respondent, Angelita Griffin (hereinafter "Griffin"), sued her former employer, Petitioner, City of Opa Locka (hereinafter "City"), and its former City Manager, Earnie Neal, seeking damages based on workplace sexual harassment and the sexual assault of Griffin by Neal on November 1, 1995, at Griffin's North Miami apartment. Relief was sought against the City for claimed violations of 42 U.S.C. §§ 1983 and 2000e. Pet. App. 7a.

The City of Opa Locka is located in northwest Miami-Dade County and is a relatively small municipality which employs fewer than 200 persons. Pet. App. 3a. Griffin began her employment with the City in 1992 as a temporary worker and eventually became a permanent clerical employee at the City. In June of 1995, the City Commission hired Neal as City Manager. Pet. App. 3a. The City has a manager/commission form of government in which an appointed manager serves as the chief executive officer and an elected mayor and four commissioners serve as the board of directors responsible for establishing policy for the municipality. Pet. App. 3a.

From June 13, 1995 until her departure from the City in early November 1995, Griffin perceived that she was sexually harassed by Neal. On October 26, 1995, Griffin tendered her resignation to the City. Pet. App. 6a.

On the afternoon of November 1, 1995, Griffin left work at the City and went home to her apartment to get

ready to perform as a singer at a Rotary Club function later that evening. Griffin had previously entered into an agreement with the Rotary Club director to sing at an installation dinner and to be paid for her performance. On the way to the Rotary Club function, Griffin damaged her car and following dinner, agreed to accept a ride home from Neal. Pet. App. 14a-15a.

At approximately 11:00 p.m., Neal drove Griffin to her gated and security patrolled apartment complex located in the City of North Miami. Pet. App. 6a. Neal helped Griffin carry her karaoke machine up to the apartment and Neal entered the apartment without an invitation. While Griffin was in the kitchen to get Neal a beverage, Neal sexually assaulted Griffin. Pet. App. 6a. No evidence was presented that Neal threatened Griffin's job or threatened to take any action with regard to her job if she did not engage in sexual relations with him. Indeed, no evidence was presented that Neal referred in any manner to his position at the City while at Griffin's apartment.

A jury trial commenced on March 20, 2000 in the Southern District of Florida. On March 31, 2000, the jury returned a verdict which found that Neal sexually harassed Griffin in the workplace; that Neal sexually assaulted Griffin in her apartment on November 1, 1995; that Neal acted under color of state law at the time of the sexual assault; and that the City had a policy or custom of condoning sexual harassment. Pet. App. 2a. The jury awarded Griffin $1,500,000.00 for the November 1, 1995 sexual assault and $500,000.00 for the workplace sexual

harassment. On April 5, 2000 the Court entered a judgment against the City and Neal in the total amount of $2,000,000.00. Pet. App. 2a.

Both the City and Neal appealed the District Court's Judgment. The United States Court of Appeals for the Eleventh Circuit affirmed the Judgment against Neal in its entirety. Pet. App. 41a. The Court of Appeals also affirmed that portion of the Judgment which awarded $500,000.00 in damages against the City for workplace sexual harassment under both 42 U.S.C. § 1983 and Title VII. Pet. App. 41a. Finally, the Court of Appeals held that Neal acted under color of state law at the time of the sexual assault (Pet. App. 14a), but reversed the $1,500,000.00 damage award against the City based on the fact that the jury had not found that the City had a policy or custom of allowing or condoning sexual assault. Pet. App. 32a. The Court of Appeals expressly declined to address the issue of whether the evidence was sufficient to establish such a policy or custom. Pet. App. 32a.

REASONS FOR GRANTING THE WRIT

In holding that Neal acted under color of law at the time of the sexual assault, the Court of Appeals expanded the scope of federal jurisdiction over torts and crimes committed by government officials in their private lives. The Court of Appeals decision conflicts with *Polk County v. Dodson*, 454 U.S. 312, 102 S.Ct. 445, 70 L.Ed. 2d 509 (1981) (function, not employment relationship, determines whether actions are under color of state law) and *United States v. Classic*, 313 U.S. 299, 326, 61 S.Ct. 1031, 1043, 85 L.Ed. 1368 (1941) (color of state law involves

actions made possible only because the wrongdoer is clothed with the authority of state law). The Eleventh Circuit's decision also conflicts with the decisions of other Courts of Appeals and the Eleventh Circuit itself. *Becerra v. Asher*, 105 F.3d 1042 (5th Cir. 1997); *Waters v. City of Morristown*, 242 F.3d 353 (6th Cir. 2001); *Roe v. Humke*, 128 F.3d 1213 (8th Cir. 1997); *Jojola v. Chavez*, 55 F.3d 488 (10th Cir. 1995); *D.T. v. Independent School District No. 16 of Pawnee County, Oklahoma*, 894 F.2d 1176 (10th Cir. 1990); and *Almand v. DeKalb County, Georgia*, 103 F.3d 1510 (11th Cir. 1997).

In addition, the Court of Appeals announced a new standard for determining when a government official's actions should be regarded as conduct under color of state law and fairly attributable to the state and held as follows:

> [N]eal's official duties did not simply provide him the opportunity to become acquainted with Griffin or to develop a relationship of trust with her that he later used to facilitate assault outside the workplace. Rather, he used his authority as Griffin's boss on a daily basis to harass and humiliate her during and after work hours both at the workplace and City related functions. This pattern of harassment and the assertion of control over Griffin both at the workplace and beyond is what differentiates this case from those where a police officer or teacher befriends or meets a victim while acting in the course of his official duties, but then later assaults them off duty, off premises, while acting in a private or personal capacity.

Pet. App. 21a-22a. (footnotes omitted)

In connection with this holding, the Eleventh Circuit also stated the following:

> It is the egregious and escalating nature of the abuse of Neal's official authority in this case to perpetrate both harassment and ultimately rape against Griffin that tips the color of law analysis in favor of concluding he was acting under color of law. Although subtle, we again reiterate the critical distinction in the color of law analysis between those cases where a state actor directly uses his official authority to create the opportunity to sexually assault a victim and those cases where a state actor merely uses his authority to develop or facilitate a relationship of trust with a victim. . . .

Pet. App. 22a. The Eleventh Circuit also stated:

> We do not believe that under the facts of this case we are required to view the sexual assault in isolation or ignore Neal's persistent abuse of authority leading up to the assault in making our color of law determination. Rather, we believe that the entire pattern of abuse and harassment against Griffin that eventually culminated in her rape is relevant to our color of law analysis.

Pet. App. 17a.

In so holding, the Court of Appeals extends federal jurisdiction to the torts committed by public officials in their private lives, even where the tortuous action is not connected with the official's function, not made possible by the official's authority and is not fairly attributable to the state.

Finally, it has been many years since the Supreme Court has addressed the color of state law requirement in the context of a wrong committed by a person employed by a governmental entity outside of the course and scope of their employment or function. During these many years, the scope of litigation under 42 U.S.C. § 1983 has dramatically expanded and it is respectfully submitted that now is an appropriate time to again address the color of state law issues raised by this case.

CONCLUSION

In the event the Court grants the original Petition for Writ of Certiorari, it is respectfully submitted that this Conditional Cross Petition for Writ of Certiorari should also be granted.

Respectfully submitted,

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